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Chong Fook Fatt v Public Prosecutor

HIGH COURT (KUCHING) — CRIMINAL APPEAL NO 41–06 OF 2003–III(II)
LAU BEE LAN JC
3 NOVEMBER 2003

B *Criminal Procedure — Trial — Discretion of Public Prosecutor — Police investigations incomplete — Prosecution ready — Whether prosecution could prosecute — Whether accused entitled to a discharge not amounting to an acquittal — Criminal Procedure Code s 173(c), Federal Constitution art 145(3)*

C The appellant appealed against the order by the learned magistrate on 21 April 2003 dismissing the appellant's application for a discharge not amounting to an acquittal ('DNNA') for a charge under s 379A of the Penal Code and to order further prosecution of the said charge against him. The grounds in support of the appeal were the application ought to be granted as the police investigations were incomplete, the prosecution would jeopardize the appellant's liberty, failure of the magistrate to give reasons for stating the
D appellant's application was premature and because of that, the appellant was in a state of doubt as to when to make such an application. The deputy public prosecutor pointed that the issue was whether the prosecution had preferred a charge against the appellant whilst the investigations were underway.

E **Held**, dismissing the appeal:

(1) When the application for DNNA was first made (second hearing date) and also on the first hearing date, the prosecution informed that court that it was ready. In the light of the interpretation to be accorded to s 173(c) of the Criminal Procedure Code (see *Karpal Singh & Anor v*
F *Public Prosecutor* [1991] 2 MLJ 544), art 145(3) of the Federal Constitution and the backdrop that the prosecution was ready to proceed with the hearing on both occasions, it was not the business of the court to interfere with the decision of the prosecution when they stated that they were ready to proceed on the evidence available as
G they were having conduct of the prosecution. The court took the statement of the prosecution that it was ready to proceed in good faith (see para 11, 18).

(2) The learned magistrate made such an order because firstly, there was evidence available; secondly, the prosecution was ready and was not seeking an adjournment; and thirdly, it was the discretion of the
H prosecution to decide whether to proceed or otherwise (see para 21).

[**Bahasa Malaysia summary**

I Perayu telah merayu terhadap perintah oleh majistret yang arif pada 21 April 2003 yang menolak permohonan perayu untuk pelepasan yang tidak bererti pembebasan ('PTBP') untuk satu pertuduhan di bawah s 379A Kanun Keseksaan dan untuk memerintah pendakwaan seterusnya

pertuduhan itu terhadap perayu. Alasan yang diberi adalah bahawa permohonan itu patut dibenarkan kerana penyiasatan polis masih belum selesai, pendakwaan itu akan menjejaskan kebebasan perayu, kegagalan majistret memberi alasan-alasan bagi menyatakan bahawa permohonan perayu adalah pramasa dan oleh itu, perayu ragu akan masa untuk membuat permohonan seperti itu. Timbalan pendakwa raya menyatakan bahawa isu adalah sama ada pihak pendakwaan telah membuat pertuduhan terhadap perayu sementara penyiasatan dijalankan.

Diputuskan, menolak rayuan itu:

(1) Semasa permohonan untuk PTBP dibuat pertama kali (tarikh pendengaran kedua) dan juga pada tarikh pendengaran pertama, pihak pendakwaan telah mem beritahu mahkamah bahawa pihak pendakwaan telah bersedia. Memandangkan tafsiran yang diberikan kepada s 173(c) Kanun Prosedur Jenayah (lihat *Karpal Singh & Anor v Public Prosecutor* [1991] 2 MLJ 544), perkara 145(3) Perlembagaan Persekutuan dan latar belakang kes bahawa pihak pendakwaan telah bersedia meneruskan pendengaran pada kedua-dua tarikh pendengaran, ia bukan untuk mahkamah campur tangan dengan keputusan pihak pendakwaan setelah ia menyatakan bahawa ia bersedia mula di atas keterangan yang ada kerana ia mengendalikan pendakwaan. Mahkamah mengambil pernyataan pihak pendakwaan bahawa ia bersedia untuk mula dengan suci hati (lihat perenggan-perenggan 11, 18).

(2) Majistret yang arif telah membuat perintah itu kerana, pertamanya, terdapat keterangan; keduanya, pihak pendakwaan telah bersedia dan tidak memohon penangguhan kes; dan ketiganya, ia merupakan budibicara pihak pendakwaan untuk memutuskan sama ada untuk mula atau sebaliknya (lihat perenggan 21).]

Notes

For cases on the discretion of the public prosecutor, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) para 4001.

Cases referred to

Karpal Singh & Anor v PP [1991] 2 MLJ 544 (folld)
PP v Tan Kim San [1980] 2 MLJ 98 (dist)

Legislation referred to

Criminal Procedure Code s 173(c)
Federal Constitution art 145(3)
Penal Code s 379A

Appeal from: Criminal Case No M–83–28–2002–E (Magistrate's Court, Kuching)

Voon Lee Shan (Voon & Co Advocates) for the appellant.
Awang Armadajaya (Deputy Public Prosecutor, Pejabat Peguam Negeri Kuching) for the respondent.

Lau Bee Lan JC:

[1] The appellant, Chong Fook Fatt has appealed against the order made by the learned magistrate made on 21 April 2003 dismissing the appellant's application for a discharge not amounting to an acquittal ('DNNA') for a charge under s 379A of the Penal Code and to order further prosecution of the said charge against him.

[2] The grounds in support of the appellant's appeal are primarily:

(1) The appellant ought to be granted a DNAA as the police investigation is incomplete.

(2) To allow the prosecution of the case against the appellant when the police investigation is incomplete would unnecessarily jeopardize the appellant's liberty.

(3) Failure of the learned magistrate to give reasons for stating that the appellant's application was premature.

(4) Failure in respect of ground (3) above has caused the appellant to be in a state of doubt as to when such an application should be made in the circumstances.

[3] In this regard, the learned deputy public prosecutor ('DPP') has aptly pointed out that the issue is essentially whether the prosecution has preferred a charge against the appellant whilst the investigations are underway. If the answer is a 'Yes', then the benefit of the doubt should be given to the appellant; if the answer is 'No', then the appeal should be dismissed. I cannot agree more with the learned DPP that that poser is basically the thrust of the appellant's appeal before the court.

[4] The appellant was jointly charged with another person, Goh Ah Tang for theft of a motorcar, a Toyota Corolla KE 70 bearing registration no KM3667Q, an offence under s 379A of the Penal Code. In the magistrate's court concerned, on 21 April 2003 it was argued on behalf of the appellant that based on a letter dated 28 March 2003 from one ASP Bong Lian Min, Acting District Head of Criminal Investigation, Kuching to Voon & Co Advocates, the solicitors for the appellant ('the first letter'), the appellant was given the impression that the police were still investigating the case against the appellant and investigations were still incomplete. The material part of the first letter reads:

> Adalah dimaklumkan pihak polis telah mengambil tindakan yang sewajarnya. Tindakan untuk mengesan AH LEE telahpun dilakukan tetapi hingga kini masih gagal. Rumah yang dikatakan milik AH LEE sebenarnya milik orang lain. Identiti AH LEE tidak jelas dan menyukarkan penyiasatan. Sungguhpun begitu, usaha akan terus dijalankan.

(hereinafter referred to as 'the material paragraph').

[5] Further, it was submitted on behalf of the appellant that following the case of *Public Prosecutor v Tan Kim San* [1980] 2 MLJ 98, the court should grant the appellant a DNAA as the investigations have not been completed.

[6] A similar submission that was made in the court below was canvassed before me. As was correctly pointed out by the learned DPP, the first letter has to be seen in its proper context. The first letter makes reference to a letter dated 11 March 2003 which is a letter addressed by Voon & Co Advocates to the Ketua Polis Daerah, Kuching ('the second letter'). The essence of the second letter is that the appellant denied the charge against him and disclosed information to the police to trace one 'Ah Lee' whom the appellant alleged had requested him to respray the motorcar. The second letter also alluded to the fact that ASP Bong was aware of Ah Lee's house and the appellant was willing to assist the police in the investigation. In addition, in the second letter, another letter dated 11 July 2002 from Voon & Co Advocates to Sgt Johari bin Seman, Central Police Station ('the third letter') was referred. In the third letter, basically it was disclosed that the appellant had led the police party headed by ASP Bong to locate Ah Lee whom the appellant alleged was the person who left the motorcar in the vicinity of his house and was believed to live in the Sg Apong area. It is also stated in the third letter that the appellant was told by ASP Bong not to go near to Ah Lee's house for security and operational reasons and that the former would search the house on some other occasion.

[7] With due respect to Mr. Voon, counsel for the appellant, I am of the opinion that his submission that the principle of law to be adduced from *Public Prosecutor v Tan Kim San* as '… once it is found that the investigation into the case is incomplete, there is a duty on the part of the court to have the accused discharged from the charge not amounting to an acquittal, but of course, the prosecution could later on reinstate the case against him':

(i) once investigations are completed; and

(ii) that there is a prima facie case against him'

is only partially correct.

[8] The following quotation from *Public Prosecutor v Tan Kim San* at p 99 was relied upon by learned counsel which states:

> This is a clear case of premature prosecution. What if the investigations disclose that there is insufficient evidence to prosecute the accused or worse still, if he was innocent of the allegation after all. On these facts, the charge as it stands, is clearly groundless. In these circumstances, the learned Magistrate, ought to have exercised his powers under s 173(g) of the Criminal Procedure Code and discharge the accused instead of granting a postponement of the case. I *would advise magistrates to exercise their powers under s 173(g) of the Criminal Procedure Code whenever the prosecution asks for a postponement of a case on the ground that investigations have not been completed*. (Emphasis added.)

[9] From the statement which is emboldened above, I am incline to agree with the learned prosecuting officer's submission before the magistrate's

court that the instant case can be distinguished from *Public Prosecutor v Tan Kim San* on the ground that the legal proposition in the latter case is that a DNAA should be made if the prosecution applies for an adjournment of the hearing of the case (see notes of proceedings at p 4 of appeal record).

[10] I believe I am fortified in holding this view because immediately preceding the material paragraph, the learned judge has this to say:

> Turning to the facts of this case, the accused is alleged to have committed criminal breach of trust over a period of four years. It took the police more than a year to investigate yet when the case came up for trial some eight months after the accused was first charged in court, investigations had still not been completed and the police say they need at least another six months.

[11] Indeed, the facts in the instant case are different. I note that on 21April 2003 ('second hearing date') when the application for DNAA was first made, the prosecution informed the court that it was ready and in fact the prosecution was ready as far back as 22 August 2002 ('first hearing date'). The prosecution was not seeking for an adjournment at all. Although the hearing was ultimately postponed on the second hearing date, it was done at the behest of the second accused (Goh Ah Tang) who wished to engage counsel. Here the learned magistrate in the exercise of his discretion allowed the postponement when the prosecution posed no objection although the defence counsel objected (see p 5 of appeal record).

[12] Can the court therefore discount the fact that the prosecution said that it was ready to proceed on both hearing dates?

[13] In *Karpal Singh & Anor v Public Prosecutor* [1991] 2 MLJ 544, (cited by the defence), the then Supreme Court held that art 145(3) of the Federal Constitution states that the Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before the Syariah Court, etc. The discretion of the Attorney-General is unfettered and cannot be challenged and substituted by that of the courts (see headnotes at p 545).

[14] With respect to s 173(c) of the Criminal Procedure Code ('CPC') which entails that when an accused claims trial, the court shall hear *'all such evidence'* as may be produced in support of the prosecution, Abdul Hamid Omar LP (as he then was) (delivering judgment on behalf of the then Supreme Court in *Karpal Singh* at p 548 opined:

> In our considered view, the expression 'all such evidence' is not confined to evidence which is available to the prosecution but which could not be produced for unavoidable reason at a specific date of hearing forming part of the trial. *The term 'all such evidence' is to be given a broad interpretation and should also include evidence which can be produced at the continued hearing of the trial on a future occasion.* (Emphasis added.)

[15] The material paragraph has to be viewed against the backdrop of the second and third letters. Viewed in that perspective, it discloses that the police had conducted investigations on Ah Lee as proposed by the appellant

but were unsuccessful since the house that was said to belong to Ah Lee was occupied by someone else. Further, the identity of Ah Lee was vague and that impeded investigation. Despite these odds the police stated that efforts will be continued to locate Ah Lee (see first letter).

[16] The existence of 'Ah Lee' was proffered by the defence and the police have assisted in investigating his whereabouts but to no avail as at 21 April 2003. My understanding of the first letter is an assurance by the police that they will pursue to trace Ah Lee, but it does not mean that the prosecution was not ready to proceed as stated by them on 21 April 2003 and it must be remembered that the investigation was set in motion at the request of the defence.

[17] However, if the said 'Ah Lee' could be traced later, s 173(c) of the CPC allows further evidence to be tendered at a future date during the continuation of the hearing of the trial. Hence, I find there is no abuse of the process of the court as alleged by the defence.

[18] In the light of the interpretation to be accorded to s 173(c) of the CPC and art 145(3) of the Federal Constitution and the backdrop that in the present case, the prosecution was ready to proceed with the hearing on both occasions, can the court interfere with the discretion of the prosecuting officer who is acting on behalf of the Attorney-General, the public prosecutor. By no means! It is not the business of the court to interfere with the decision of the prosecution when they state that they are ready to proceed on the evidence available as they are having conduct of the prosecution. The court will take the statement of the prosecution that it is ready to proceed in good faith.

[19] Therefore, I am of the view that the learned magistrate did not err as contended by Mr Voon when he said:

> Upon hearing to [sic] both parties, the court is of the view that *it is premature for court to decide* at this stage that the charge against the accused [sic] groundless and whether or not to discharge the accused under s 173(g) on the grounds that the charge is groundless. In this case, the *prosecution is ready to proceed, and the prosecution should be allowed to proceed with their case.* Application for discharge not amounting to an acquittal is dismissed. (Emphasis added.)

[20] In my considered opinion, the keywords to be noted in the learned magistrate's order are:

(1) it is premature for the court to decide;

(2) the prosecution is ready to proceed; and

(3) the prosecution should be allowed to proceed with their case.

[21] I surmise that the learned magistrate made such an order because in the three situations above, firstly, there was evidence available; secondly, the prosecution was ready and was not seeking an adjournment; and thirdly, it is the discretion of the prosecution to decide whether to proceed or otherwise. It is not for the court to trespass into the prosecution's turf.

[22] In conclusion, for all the aforesaid reasons, I find there is no merit in the arguments of the defence. Under the circumstances, the order of the learned magistrate is affirmed. The appeal of the appellant is accordingly dismissed.

Appeal dismissed.

Reported by Chew Phye Ken